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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE BETH LABSON FREEMAN

ARISTA NETWORKS, INC.,)	
)	
PLAINTIFF,)	
)	
VS.)	NO. C 16-CV-00923 BLF
)	
CISCO SYSTEMS,)	
)	SAN JOSE, CALIFORNIA
DEFENDANT.)	THURSDAY
)	MAY 26, 2016
_____)	

TRANSCRIPT OF PROCEEDINGS OF THE OFFICIAL ELECTRONIC SOUND

RECORDING 11:17 A.M. - 11:53 A.M.

APPEARANCES:

FOR PLAINTIFF

WILSON, SONSINI, GOODRICH & ROSATI
1301 AVENUE OF THE AMERICAS
40TH FLOOR
NEW YORK, NEW YORK 10019

**BY: JONATHAN M. JACOBSON, ESQUIRE
CHUL PAK, ESQUIRE**

KEKER & VAN NEST, LLP
633 BATTERY STREET
SAN FRANCISCO, CALIFORNIA 94111

BY: DAVID J. SILBERT, ESQUIRE

(FURTHER APPEARANCES ON FOLLOWING PAGE)

**REPORTED BY: JOAN MARIE COLUMBINI, CSR #5435, RPR
RETIRED OFFICIAL COURT REPORTER, USDC**

APPEARANCES (CONTINUED) :

FOR DEFENDANT:

DESMARAIS LLP
230 PARK AVENUE
NEW YORK, NEW YORK 10169

**BY: JOHN M. DESMARAIS, ESQUIRE
PAUL A. BONDOR, ESQUIRE
TAMIR PACKIN, ESQUIRE**

ALSO PRESENT:

MARK TAXAY, ARISTA GENERAL COUNSEL

1 THURSDAY, MAY 26, 2016

11:17 A.M.

2 (TRANSCRIBER'S NOTE: DUE AT TIMES TO COUNSEL'S FAILURE TO
3 IDENTIFY THEMSELVES WHEN SPEAKING, CERTAIN SPEAKER
4 ATTRIBUTIONS ARE BASED ON EDUCATED GUESS.)

5
6 PROCEEDINGS

7 ---000---

8 **THE CLERK:** CALLING CASE 16-0923, ARISTA NETWORKS
9 VERSUS CISCO SYSTEMS.

10 COUNSEL, PLEASE COME FORWARD AND STATE YOUR
11 APPEARANCES.

12 **MR. DESMARAIS:** GOOD MORNING, YOUR HONOR. JOHN
13 DESMARAIS ON BEHALF OF CISCO SYSTEMS.

14 **THE COURT:** HELLO, MR. DESMARAIS.

15 **MR. JACOBSON:** JONATHAN JACOBSON, WILSON SONSINI, FOR
16 ARISTA. AND I'M JOINED TODAY BY MY PARTNER CHUL PAK. MARC
17 TAXAY FROM THE COMPANY, AND DAVID SILBERT WHO I BELIEVE YOU
18 KNOW FROM ANOTHER CASE.

19 **THE COURT:** YES, THAT'S RIGHT. GOOD MORNING TO ALL
20 OF YOU.

21 (SIMULTANEOUS SPEAKING.)

22 **THE COURT:** ALL RIGHT. BEFORE I GET STARTED, LET ME
23 JUST -- I DON'T ACTUALLY THINK THIS IS AN ISSUE OF CONCERN, BUT
24 I BELIEVE IN DISCLOSURE. THE LAW CLERK WHO GENERALLY WORKS
25 WITH ME ON THIS CASE CAME TO ME A YEAR AGO FROM COVINGTON &

1 BURLING, AND I KNOW THAT COVINGTON HAS BEEN ASSOCIATED ON THE
2 CASE. AND HE'S GOING ON TO ANOTHER CLERKSHIP, SO HE'S NOT
3 GOING RIGHT BACK TO COVINGTON AND I WANTED TO MAKE SURE NO ONE
4 HAD ANY CONCERN ABOUT HIM WORKING ON THE CASE DURING THE LAST
5 FEW WEEKS OF HIS TERM WITH ME.

6 **MR. DESMARAIS:** NO CONCERN, YOUR HONOR.

7 **MR. JACOBSON:** NO, NO, YOUR HONOR.

8 **THE COURT:** OKAY. THANK YOU. ALL RIGHT. THIS IS
9 THE OTHER SIDE OF THE COIN HERE, AND YOU'VE TRADED PLACES AT
10 THE PODIUM THERE, BUT I HAVE.

11 **MR. DESMARAIS:** JUST TEMPORARILY.

12 **THE COURT:** I KNOW, I KNOW. TRUST ME.

13 THIS CASE, I DON'T SEE ANY REASON IN GIVING PRIORITY
14 TO IT THE WAY I DID FOR THE PATENT AND COPYRIGHT CASE.

15 **MR. JACOBSON:** CAN I ADDRESS YOUR HONOR?

16 **THE COURT:** SURE. WELL -- AND I HAVE NO ROOM IN MY
17 SCHEDULE, BECAUSE -- YOU ABSOLUTELY CAN, MR. JACOBSON, BUT I
18 TURNED MYSELF INSIDE OUT AND BUMPED OTHER CASES THAT ARE MUCH
19 OLDER IN ORDER TO HAVE ONE CASE HEARD QUICKLY. SO LET ME
20 HEAR --

21 **MR. JACOBSON:** I UNDERSTAND, BUT THAT WAS AT ARISTA'S
22 EXPENSE, YOUR HONOR. THAT WAS NOT AT OUR REQUEST. AND THE
23 URGENCY THAT CISCO URGED TO GET YOU TO DO THAT IS REALLY NOT
24 THE CASE, BUT WHETHER IT IS OR NOT, THE URGENCY FOR ARISTA IS
25 OVERWHELMING.

1 CISCO, AS IT MAKES CLEAR FROM ITS PAPERS, IS TRYING
2 TO PUT ARISTA OUT OF BUSINESS.

3 **THE COURT:** YEAH.

4 **MR. JACOBSON:** THIS IS NOT SOMETHING THAT THE COMPANY
5 REALLY CAN HAVE HANGING OVER ITS HEAD FOR AN INDEFINITE PERIOD
6 OF TIME. THE STAY REQUEST IS PART OF THAT, BUT WHETHER -- YOU
7 KNOW, IF -- AND I HEARD YOU SAY, YOU KNOW, YOU WERE LOOKING AT
8 AUGUST 2018.

9 **THE COURT:** I AM, YEAH.

10 **MR. JACOBSON:** WE THINK THIS CASE CAN BE ADJUDICATED
11 QUICKLY. THE SCHEDULE WE'VE PUT TOGETHER IS A 23-MONTH
12 SCHEDULE FROM THE FILING OF THE COMPLAINT. CISCO, IN THE
13 COPYRIGHT CASE, GOT 13 MONTHS, AND WHAT THEY'RE PROPOSING HERE
14 IS 29 MONTHS. AND THE DIFFERENCE IS, CANDIDLY, UNFAIR TO
15 ARISTA, AND THERE'S NO REASON WHY OUR CASE SHOULD BE TREATED,
16 YOU KNOW, FUNDAMENTALLY DIFFERENTLY THAN THE CASE THAT CISCO
17 HAS BROUGHT.

18 THIS IS A CASE, YOUR HONOR -- THIS IS THE FIRST TIME
19 I'VE BEEN BEFORE YOU.

20 **THE COURT:** YEAH.

21 **MR. JACOBSON:** THIS IS A CASE, YOUR HONOR, WHERE
22 THERE IS INJURY, NOT ONLY TO ARISTA, WHICH IS BEING THREATENED
23 BY BEING PUT OUT OF BUSINESS, BUT ALSO TO THE PUBLIC AS A
24 WHOLE.

25 YESTERDAY -- I DON'T KNOW IF YOUR HONOR HAS HAD A

1 CHANCE TO LOOK AT THE DOCUMENT -- AN AMICUS BRIEF WAS FILED BY
2 STANFORD AND PUBLIC KNOWLEDGE TALKING ABOUT THE PUBLIC INTEREST
3 IN THE CASE. AND IF THE INDUSTRY STANDARD CLI AND THE BUNDLING
4 AND INTIMIDATION THREATS ARE ALLOWED TO CONTINUE AND ARISTA CAN
5 NO LONGER COMPETE EFFECTIVELY, THEN THE ONLY EFFECTIVE
6 COMPETITION FOR CISCO IS GOING TO BE THE OTHER SIX DWARVES WHO
7 ARE GOING TO BE THREATENED WITH SIMILAR ACTIVITY BECAUSE, OTHER
8 THAN JUNIPER, PRETTY MUCH EVERYONE IN THE INDUSTRY USES
9 CISCO-LIKE CLI.

10 WE PUT IN OUR PAPERS, YOUR HONOR, THE FACT THAT
11 CISCO-LIKE CLI IS OFTEN FOUND IN REQUESTS FOR PROPOSALS THAT
12 FIRMS THAT ARE CONSIDERING ACQUIRING, YOU KNOW, ADDITIONAL
13 SWITCHES.

14 SO, YOUR HONOR, WE DON'T THINK THERE'S ANY BASIS FOR
15 A STAY. THE STAY HAS BEEN BRIEFED BY OUR SIDE. WE HAVE NOT
16 YET GOTTEN COUNSEL'S REPLY BRIEF ON THE OTHER SIDE, BUT I THINK
17 IF YOU CAN -- IF YOUR HONOR CAN SEE FIT TO GIVE US THE EARLIEST
18 TRIAL DATE POSSIBLE, I'M KIND OF --

19 **THE COURT:** SO, MR. JACOBSON, WHAT WOULD BE YOUR
20 IDEAL DATE FOR -- MONTH FOR TRIAL OF THIS CASE?

21 **MR. JACOBSON:** SO THE ONE THAT WE PUT IN OUR PORTION
22 OF THE CMC.

23 **THE COURT:** I WAS LOOKING FOR IT. I COULDN'T -- I
24 KEEP FLIPPING THROUGH --

25 **MR. JACOBSON:** JANUARY 2018, YOUR HONOR.

1 **THE COURT:** JANUARY 2018?

2 **MR. JACOBSON:** IT'S IN THE SCHEDULE AT THE VERY END
3 OF THE DOCUMENT.

4 **THE COURT:** I KNOW. THAT'S WHAT I WAS LOOKING FOR.

5 **MR. DESMARAIS:** THERE IT IS, EXHIBIT A, YOUR HONOR.

6 **THE COURT:** OH, I'M SORRY. IT'S EXHIBIT A. I JUST
7 DIDN'T GET QUITE -- I SAW THE SIGNATURE LINE, AND -- I KNEW I
8 READ IT LAST NIGHT. OKAY.

9 **MR. JACOBSON:** JANUARY 15TH.

10 **MR. DESMARAIS:** I'D LIKE TO BE HEARD ON THAT, YOUR
11 HONOR.

12 **THE COURT:** OKAY.

13 **MR. DESMARAIS:** SO I THINK THE ARGUMENT THAT WAS JUST
14 MADE HAS NO MERIT FOR SEVERAL FUNDAMENTAL REASONS.

15 NUMBER ONE, IF THIS CASE WAS SO IMPORTANT TO ARISTA,
16 WHY DID THEY WAIT SO LONG TO FILE IT? WHEN YOU LOOK AT WHAT
17 THE MERITS OF THE COMPLAINT ARE, THEY'RE ARGUING THAT CISCO'S
18 ENFORCEMENT OF ITS COPYRIGHTS IS WHAT GIVES THE BASIS FOR THE
19 CHANGE OF POSITION. IT'S THE WHOLE FOUNDATION OF THE ANTITRUST
20 CLAIM.

21 WE SUED THEM YEARS AGO ON A COPYRIGHT. THE COPYRIGHT
22 CASE HAS BEEN PENDING FOR A LONG TIME. THE PATENT CASE HAS
23 BEEN PENDING FOR EVEN LONGER. THIS ISN'T A NEW CLAIM. IT'S AN
24 OLD CLAIM THAT THEY JUST MADE SO IF IT WAS URGENT, THEY SHOULD
25 HAVE FILED IT WHEN THEY HAD NOTICE OF CISCO'S ALLEGED CHANGE OF

1 POSITION.

2 BUT EVEN MORE FUNDAMENTALLY, IN THE COPYRIGHT CASE,
3 WHICH YOUR HONOR IS GOING TO TRY IN NOVEMBER --

4 **THE COURT:** YEAH.

5 **MR. DESMARAIS:** -- THEIR AFFIRMATIVE DEFENSE OF
6 EQUITABLE ESTOPPEL WILL PROTECT THEM IF THERE'S ANY MERIT TO
7 THIS CLAIM.

8 **THE COURT:** YEAH.

9 **MR. DESMARAIS:** THIS CLAIM SAYS THAT CISCO DID ONE
10 THING, ARISTA RELIED ON IT, AND THEN CISCO SWITCHED. THAT IS
11 THEIR EQUITABLE ESTOPPEL DEFENSE. SO THEY WILL GET ALL THE
12 RELIEF THEY NEED FROM THE COPYRIGHT CLAIM IN YOUR TRIAL IN
13 NOVEMBER IF THERE'S ANY MERIT TO IT.

14 ALL THIS IS IS GOING TO ADD DAMAGES ON TOP OF THAT.
15 IT'S NOT URGENT. THEY DON'T NEED THE DAMAGES NOW. AND THEY'VE
16 WAITED A LONG TIME TO FILE THIS CASE.

17 BUT THERE'S ALSO A THIRD REASON, WHICH IS, YOU KNOW,
18 NOT JUST THEIR DELAY, NOT JUST (UNINTELLIGIBLE) ISSUE IN
19 NOVEMBER, BUT THE THIRD REASON IS THEY'RE FULLY BRIEFED IN OUR
20 MOTION TO STAY, WHICH IS IF THE COPYRIGHT CASE IS SUCCESSFUL OR
21 IF THE ITC ORDERS BECOME FILE, THEY HAVE NO BASES FOR THEIR
22 ANTITRUST CLAIM AT ALL, BECAUSE THEY'RE NOT PROPERLY ON THE
23 MARKET, AND THIS HAS ALL BEEN BRIEFED. I DON'T WANT TO ARGUE
24 THE STAY MOTION.

25 **THE COURT:** AND, YOU KNOW, THE STAY MOTION DOESN'T

1 COME UP TILL AUGUST.

2 **MR. DESMARAIS:** THAT'S CORRECT.

3 **THE COURT:** AND I'M NOT HEARING THAT TODAY, ALTHOUGH
4 I CERTAINLY APPRECIATE THAT THAT IS ON MY DOCKET.

5 **MR. DESMARAIS:** THERE IS ONE THING I WANTED TO SAY
6 ABOUT THAT.

7 **THE COURT:** YEAH.

8 **MR. DESMARAIS:** WHICH IS I WOULD LIKE TO ASK TODAY
9 FORMALLY TO HAVE THE COURT -- SO DISCOVERY HAS ALREADY GOT
10 UNDERWAY.

11 **THE COURT:** GOOD.

12 **MR. DESMARAIS:** WE EXCHANGED INITIAL DISCLOSURES. WE
13 SERVED DOCUMENT REQUESTS AND INTERROGATORIES. BUT THAT WILL BE
14 A COLOSSAL WASTE OF RESOURCES FOR BOTH COMPANIES. AND THERE IS
15 GOING TO BE DISCOVERY DISPUTES, SO IT WILL BE A WASTE OF THE
16 COURT'S RESOURCES.

17 WE WOULD ARGUE TODAY AND ASK THE COURT'S INDULGENCE
18 TO STAY THAT DOCUMENT DISCOVERY AND (UNINTELLIGIBLE) DISCOVERY
19 UNTIL YOU HEAR THE FORMAL STAY MOTION IN AUGUST, WHICH IS ONLY
20 TWO MONTHS FROM NOW. AND IT'S GOING TO BE A COLOSSAL WASTE OF
21 RESOURCES IF THE COMPANY IS -- THESE TWO COMPANIES ARE
22 COLLECTING DOCUMENTS YET AGAIN AND HAVING US WRITE
23 (UNINTELLIGIBLE) AND NOTICING DEPOSITIONS, AND THERE'S GOING TO
24 BE DISPUTES ABOUT THE SCOPE.

25 AND I CAN TELL YOU IN JUST TWO SECONDS THE NATURE OF

1 THE STAY MOTION? IN JUNE THE ITC ORDER WILL BECOME FINAL.
2 ARISTA WILL BE BARRED FROM THE MARKET IN THE UNITED STATES.

3 **THE COURT:** WELL, THAT WILL CHANGE THINGS, WON'T IT,
4 IF THAT HAPPENS.

5 **MR. DESMARAIS:** THERE'S NO ANTITRUST ACTION IF THAT
6 HAPPENS.

7 SECONDARILY, YOU'RE TRYING IN NOVEMBER THE CLI CASE.
8 AND IF THEY'RE FOUND LIABLE THERE, THERE'S NO BASIS FOR -- SO
9 THE IDEA THAT WE WOULD START WASTING MONEY ON THIS ANTITRUST
10 CLAIM WHEN IT'S NOT AN ORIGINAL CLAIM, BECAUSE YOU'RE GOING TO
11 RESOLVE EQUITABLE ESTOPPEL AT THE TRIAL, WHICH IS THE SAME BASE
12 OF FACT.

13 WHAT ARE WE DOING? WHY ARE WE WASTING YOUR TIME, OUR
14 TIME, OUR CLIENT'S MONEY? WHY? IT SEEMS SILLY TO UNDERTAKE
15 THIS NOW WHEN WE'RE JUST ASKING FOR A FEW MONTHS. SO WE SET UP
16 OUR SCHEDULE WITH -- WE KNEW YOUR HONOR'S TRIAL DATE WAS SUMMER
17 OF 2018.

18 **THE COURT:** YEAH.

19 **MR. DESMARAIS:** AND YOU'LL NOTICE THE WAY WE LAID OUT
20 OUR SCHEDULE, WE DON'T -- AND THIS IS THE SCHEDULE THAT'S
21 DEFENDANTS MADE -- WE DON'T START DISCOVERY UNTIL JANUARY. SO
22 WE LAID OUT ALL THE DATES, BUT WE START THE DISCOVERY IN
23 JANUARY. THAT GIVES TIME FOR THE ITC TO BECOME FINAL. IT
24 GIVES TIME FOR YOUR NOVEMBER TRIAL TO BECOME FINAL. AND AT
25 THAT POINT, WE CAN ALL TAKE A BREATH AND SEE IF THERE IS ANY

1 ANTITRUST CLAIM.

2 WE START DISCOVERY IN JANUARY. AND WE'VE GIVEN THE
3 SAME AMOUNT OF DISCOVERY HERE THAT THEY GIVE IN THEIR SCHEDULE,
4 SO WE'RE NOT CONDENSING THE DISCOVERY AMOUNT OF TIME, AND IT
5 WORKS OUT NICELY SO THAT THE TRIAL WILL THEN BE IN JULY.

6 SO WE THINK THAT FROM A JUDICIAL ECONOMY POINT OF
7 VIEW, FROM A PARTIES' RESOURCES POINT OF VIEW, IT GETS THE JOB
8 DONE, AND THEY'RE GOING TO ADJUDICATE THEIR EQUITABLE ESTOPPEL
9 IN NOVEMBER WHEN WE'RE HERE.

10 **MR. JACOBSON:** YOUR HONOR, CAN I RESPOND?

11 **THE COURT:** SURE.

12 **MR. JACOBSON:** I KNOW YOUR HONOR HAS A QUESTION, AND
13 I'LL BE HAPPY TO ANSWER IT, TOO.

14 **THE COURT:** I'LL PROBABLY FORGET IT BY THE TIME...

15 **MR. JACOBSON:** EVERYTHING YOU JUST HEARD, EVERYTHING
16 IS COMPLETELY WRONG AND LET ME EXPLAIN WHY.

17 WHY DID WE WAIT SO LONG TO BRING THE CASE? THE
18 DISCOVERY IN THE CLI CASE WAS IMPORTANT. CERTAINLY, WE
19 COULDN'T BRING IT UNTIL WE HAD HAD THAT. BUT MUCH MORE
20 IMPORTANTLY, THE DECISION TO BRING AN ANTITRUST CASE IS A MAJOR
21 CORPORATE DECISION.

22 **THE COURT:** SURE.

23 **MR. JACOBSON:** IT IS AN INVESTMENT OF MANY MILLIONS
24 OF DOLLARS. IT IS NOT DONE LIGHTLY.

25 IN THIS CASE, IT WAS DONE ONLY AFTER THE FAR MORE

1 RECENT DISCOVERY OF THE SMARTNET BUNDLED PRICING AND THE
2 INTIMIDATION OF OUR CUSTOMERS AND SUPPLIERS. THAT'S WHAT MADE
3 IT URGENT. THAT'S WHY IT WAS FILED WHEN IT WAS. THAT IS THE
4 SAME URGENCY THAT I MENTIONED BEFORE.

5 SECOND, EQUITABLE ESTOPPEL. YOUR HONOR MAY NEVER
6 REACH EQUITABLE ESTOPPEL IN THAT CASE, AND EVEN IF YOU DO, FOR
7 REASONS THAT WE LAY OUT IN OUR BRIEF, THERE IS NO WAY THAT THE
8 DETERMINATION ON EQUITABLE ESTOPPEL CAN BE COLLATERAL ESTOPPEL
9 IN THE ANTITRUST CASE.

10 AND, VERY BRIEFLY -- AND YOUR HONOR WILL GO INTO
11 THIS, I KNOW, IN AUGUST OF 2018. EQUITABLE ESTOPPEL IS
12 BASICALLY FOOLING ARISTA. THE ANTITRUST CLAIM IS FOOLING THE
13 INDUSTRY. FUNDAMENTALLY DIFFERENT. AND WE HAVE A JURY TRIAL
14 RIGHT ON THAT CLAIM THAT REALLY CANNOT FAIRLY BE REMOVED
15 THROUGH AN EQUITABLE DETERMINATION ON EQUITABLE ESTOPPEL. SO
16 THERE'S NO CHANCE OF THAT.

17 THE ITC CASES, THEY'RE ASSUMING THAT WE DON'T HAVE
18 WORKAROUNDS ON THEIR PATENTS.

19 **THE COURT:** THEY DIDN'T MENTION THAT IN THEIR PAPERS.

20 **MR. JACOBSON:** AND WE DO. WE DO. THERE'S NO WAY THE
21 ITC CASE IS GOING TO PUT ARISTA OUT OF BUSINESS.

22 THE COPYRIGHT CASE, LET'S SAY THEY WIN THE COPYRIGHT
23 CASE. THAT'S NOT A DEFENSE IN THE ANTITRUST CASE. THAT IS THE
24 SQUARE HOLDING OF THE MICROSOFT DECISION THE EN BANC DECISION
25 OF THE D.C. CIRCUIT.

1 SO NONE OF -- THIS CASE IS GOING TO PROCEED, YOU
2 KNOW, SUBJECT TO DISPOSITIVE MOTIONS, WHICH WE'RE CONFIDENT OF
3 PREVAILING ON, BUT THERE'S NO -- THERE'S NO WAY TO SAY THAT THE
4 INTELLECTUAL PROPERTY CASES ARE GOING TO BE THE END OF THIS
5 CASE, THEY'RE JUST NOT.

6 MR. DESMARAIS: I HAVE A RESPONSE TO THAT ON
7 (UNINTELLIGIBLE) GROUND, YOUR HONOR.

8 (SIMULTANEOUS SPEAKING.)

9 MR. JACOBSON: BUT --

10 MR. DESMARAIS: I'M SORRY --

11 MR. JACOBSON: I'M JUST IN THE MIDDLE OF MY RESPONSE.

12 MR. DESMARAIS: I DIDN'T MEAN TO INTERRUPT YOU. YOU
13 WERE TAKING A BREATH.

14 MR. JACOBSON: SO THE PAPER DISCOVERY, IF WE'RE GOING
15 TO HAVE A TRIAL DATE IN THE SUMMER, WHICH, YOU KNOW, WE REALLY
16 DON'T WANT FOR ALL THE REASONS I'M TALKING ABOUT, EVEN IF THAT
17 IS THE TRIAL DATE, WE NEED TO COMMENCE THE DISCOVERY NOW. THE
18 DISCOVERY IS PAPER DISCOVERY. OF COURSE THERE ARE GOING TO BE
19 DISPUTES, BUT BOTH SIDES PROVIDED YOUR HONOR WITH QUITE
20 COMPRESSED SCHEDULES. WE DID SO TO GET AN EARLY TRIAL DATE.
21 CISCO DID SO TO ACCOMMODATE THE STAY THAT IT'S SEEKING AND THE
22 JULY 2018 TRIAL DATE.

23 IF THE TRIAL DATE IS NOT GOING TO BE IN JANUARY,
24 THERE'S STILL NO REASON -- IT'S WRITTEN DISCOVERY. ALL RIGHT?
25 THE DEPOSITIONS AREN'T GOING TO TAKE PLACE UNTIL BOTH SIDES

1 HAVE SEEN THE DOCUMENTS. THE WRITTEN DISCOVERY IS GOING TO
2 PROCEED. THERE'S NO REASON TO DELAY IT. AT THIS POINT, IT'S
3 PURELY PREJUDICIAL TO ARISTA. AND A LOT OF THE DISCOVERY --
4 THEY'VE BEEN TAKING DISCOVERY ON THE ANTITRUST ISSUES IN THE
5 COPYRIGHT CASE. THEY'VE TAKEN --

6 **THE COURT:** WELL, THAT ALWAYS HAPPENS.

7 **MR. JACOBSON:** BUT THESE ARE ISSUES THAT HAVE NO
8 RELATIONSHIP TO THE CLI. THEY'VE BEEN ASKING OUR FOLKS ABOUT
9 THE BUNDLING CLAIM, ABOUT THE SMARTNET CLAIM, AND YET THEY'RE
10 TRYING TO PREVENT US FROM TAKING DISCOVERY ON THOSE ISSUES HERE
11 IT. JUST DOESN'T MAKE ANY SENSE. IT'S COMPLETELY UNFAIR.

12 **THE COURT:** WELL, I'M NOT GOING TO IMPOSE ANY STAY
13 UNTIL THE MOTION IS HEARD. I'M JUST NOT PREPARED TO DO THAT.

14 **MR. JACOBSON:** THANK YOU.

15 **THE COURT:** I'M NOT GOING TO PREJUDGE THE
16 APPROPRIATENESS OF THE STAY WHEN I HEAR THAT MOTION.

17 MR. JACOBSON, I WISH MY CALENDAR WEREN'T SO IMPACTED.
18 AND I -- IF I WERE TO GIVE YOU A JANUARY DATE, YOU'D BE THE
19 THIRD TRIAL SET, AND I CAN'T GUARANTEE YOU'D GO OUT TO TRIAL.
20 AND THEN IF YOU LOSE THAT TRIAL DATE, YOU MIGHT BE A YEAR AND A
21 HALF BEFORE I GET YOU BACK IN. THAT'S THE REALITY OF MY
22 CALENDAR, AND THAT'S WHAT I LOOK AT.

23 WHAT I WAS PLANNING TO DO WAS TO GIVE YOU A DATE IN
24 AUGUST. SO THAT'S EIGHT MONTHS LATER. I RECOGNIZE THAT'S A
25 LONG TIME. BUT THEN TO SET NO OTHER CASES ON THE TWO WEEKS I

1 WOULD ALLOW FOR THIS TRIAL.

2 SO, YOU KNOW, THAT'S -- YOU KNOW, TO BE ASSURED OF A
3 TRIAL DATE THAT'S YOURS ALONE, AND IF YOU SETTLE, OF COURSE NO
4 OFFENSE TAKEN.

5 BUT I ACTUALLY HAVE CONCERN THAT -- AND I JUST HAD A
6 CASE THAT WAS TWO CASES SET FOR TRIAL THE SAME DAY, THE OLDER
7 CASE WENT, BUMPED OUT THE OTHER ONE. I WAS ABLE TO OFFER THEM
8 A DATE IN JUNE. THEY WEREN'T AVAILABLE. I HAVEN'T RESET THE
9 TRIAL DATE, AND THEY MAY BE DELAYED A YEAR BEFORE I CAN GET
10 THEM IN REASONABLY TO BE THE FIRST ONE UP BUT NEVER TO HAVE THE
11 DATE THEMSELVES.

12 AND SO, YOU KNOW, I'M LOOKING AT MY JANUARY CALENDAR,
13 AND I SEE CASES, CIVIL RIGHTS CASES, THAT ARE, FRANKLY, MORE
14 IMPORTANT, BECAUSE THEY'RE OLD AND BECAUSE INDIVIDUALS WHO HAVE
15 BEEN HARMED ARE WAITING FOR THEIR TRIAL DATE. AND SO, YOU
16 KNOW, I DON'T SEE A DATE IN JANUARY, FEBRUARY WHERE YOUR CASE
17 WOULD COME UP FIRST, BECAUSE I CAN'T GIVE IT TO YOU ALONE.
18 THAT'S MY PROBLEM. AND, FRANKLY, THE COST TO YOUR CLIENTS OF
19 BEING READY FOR TRIAL AND THEN BEING BUMPED FOR SIX MONTHS IS
20 PRETTY SIGNIFICANT.

21 **MR. DESMARAIS:** YOUR HONOR, THIS IS THE KIND OF CASE
22 THAT'S GOING TO HAVE A LOT EXPERT TESTIMONY, AND THESE EXPERTS,
23 A LOT OF THEM ARE PROFESSORS. AND, YOU KNOW, TO HAVE A DATE
24 AND THEN MOVE THE DATE AND THEN MOVE THE DATE -- TO FIND A NEW
25 DATE WILL BE IMPOSSIBLE.

1 **THE COURT:** WELL, I RECOGNIZE THAT, AND I AM -- I TRY
2 TO BE GENEROUS IN MY RESETTING OF THE CASE BECAUSE YOU HAVE SO
3 MANY MOVING PARTS. BUT, YOU KNOW, GONE ARE THE DAYS WHEN YOU
4 JUST SAT IN THE COURTHOUSE DAY AFTER DAY UNTIL THE CASE BEFORE
5 YOU WAS FINISHED. SO, WHAT I WAS INCLINED TO DO WAS TO SET
6 THIS FOR AUGUST 6TH OF 2018, AND THEN I WOULD SET NO OTHER
7 CASES.

8 **MR. DESMARAIS:** THAT WORKS FOR CISCO, YOUR HONOR.

9 **THE COURT:** OKAY.

10 **MR. JACOBSON:** IT REALLY DOESN'T FOR ARISTA, YOUR
11 HONOR, FOR THE REASONS THAT I ARTICULATED BEFORE. YES, WE
12 UNDERSTAND THAT THERE'S A RISK, AND THAT IS CERTAINLY
13 COUNTERBALANCED BY THE CERTAINTY OF AN AUGUST '18 TRIAL DATE.
14 BUT THE HARM TO MY CLIENT IS CONTINUING.

15 AND, YOUR HONOR, I'VE SPENT QUITE A BIT OF MY CAREER
16 DOING CIVIL CASES PRO BONO.

17 **THE COURT:** YEAH.

18 **MR. JACOBSON:** I COMPLETELY SUPPORT THE PROPOSITION
19 THAT THOSE CASES ARE IMPORTANT, AND THE RIGHTS OF THE
20 INDIVIDUALS ARE FUNDAMENTAL TO OUR JUDICIAL SYSTEM, BUT THIS IS
21 A CASE -- I REALLY DON'T WANT TO LEAVE YOU WITH ANY OTHER
22 IMPRESSION. THIS AFFECTS SILICON VALLEY. RIGHT? THIS CASE --
23 NETWORKING IS CENTRAL TO THE ENTIRE OPERATION OF EVERYTHING
24 THAT GOES ON IN SILICON VALLEY, AND TO HAVE A MONOPOLIST OF
25 ETHERNET SWITCHES, YOU KNOW, GO, YOU KNOW, UNCORRECTED IS GOING

1 TO BE HARMFUL TO EVERYONE, LARGELY FOR THE REASONS THAT WERE
2 SET FORTH IN THE AMICUS BRIEF FILED LAST NIGHT.

3 **MR. DESMARAIS:** YOUR HONOR, I --

4 **THE COURT:** WHICH, OF COURSE, I -- IT'S NOT
5 ASSOCIATED TO ANYTHING. I MEAN, I DON'T EVEN KNOW THAT I'LL
6 ALLOW THAT BRIEF, BECAUSE -- I MEAN, SOMEONE COULD MAIL ME A
7 LAW REVIEW ARTICLE, BUT I WAS A LITTLE SURPRISED TO GET AN
8 AMICUS BRIEF JUST FOR MY EDIFICATION. I'M NOT DECIDING
9 ANYTHING NOW. I AM AWARE THAT THERE WAS A REQUEST TO RECEIVE
10 IT. I WAS WAITING TO SEE IF THERE WAS ANY OPPOSITION. I MEAN,
11 IF THERE'S NO OPPOSITION --

12 **MR. DESMARAIS:** WE'RE GOING TO TALK ABOUT THAT TODAY,
13 YOUR HONOR.

14 **THE COURT:** OKAY.

15 **MR. DESMARAIS:** BUT JUST TO RESPOND TO MR. JACOBSON'S
16 COMMENT, AND TO REITERATE, YOU ARE GOING TO RESOLVE THE MERITS
17 OF HIS BASIC BEEF WITH CISCO AT THE NOVEMBER TRIAL. HIS
18 EQUITABLE ESTOPPEL DEFENSE, WHILE IT MAY OR MAY NOT BE
19 PRECLUSIVE OF THE ANTITRUST, IF IT HAS ANY MERIT --

20 **THE COURT:** IT WILL --

21 **MR. DESMARAIS:** -- YOU'RE GOING TO DECIDE IT. AND IF
22 YOU DECIDE IT IN THEIR FAVOR, THEY GET ALL THE RELIEF THEY
23 NEED. EQUITABLE ESTOPPEL WILL PREVENT CISCO FROM ENFORCING ITS
24 COPYRIGHTS IN THE CLI. SO HIS CLIENT IS GOING TO GET THEIR DAY
25 IN COURT. HE WILL (UNINTELLIGIBLE). SO IT DOESN'T MAKE ANY

1 SENSE THAT WE WOULD STAND ON OUR HEAD TO TRY TO SCHEDULE THIS
2 THING ON TOP OF THREE OTHER TRIALS.

3 **THE COURT:** I MEAN, THE OTHER PROBLEM I HAVE,
4 MR. JACOBSON, IS SCHEDULING WHICH WILL NO DOUBT KNOCKDOWN
5 DRAG-OUT FIGHTS ON *DAUBERT* MOTIONS, SUMMARY JUDGMENT MOTIONS.
6 I HAVE COME TO EXPECT TWO ROUNDS OF *DAUBERT* MOTIONS AT THE
7 SUMMARY JUDGMENT STAGE AND AT TRIAL.

8 AND SO, FRANKLY, I REGRET PERSONALLY THAT I SCHEDULED
9 THE OTHER CASE SO QUICKLY, BECAUSE IT'S VERY HARD TO
10 ACCOMMODATE IT. YOU DIDN'T WANT IT, I KNOW THAT, BUT THAT
11 IS -- THAT IS A -- THAT'S VERY DIFFICULT, AND I JUST CAN'T TURN
12 THE SCHEDULE INSIDE OUT ON OTHER CASES FOR PARTIES WHO HAD TO
13 WAIT TWO YEARS AND THEN TO BE KICKED BY PARTIES WHO HAVE NOT
14 WAITED AS LONG IS DIFFICULT.

15 AND THE OTHER THING IS, IT'S -- YOU KNOW, I GENERALLY
16 TRY TO DECIDE WHICH CASE IS MORE IMPORTANT BY WHICH ONE IS
17 OLDER, BECAUSE THE LITIGANTS RIGHTFULLY FEEL THAT THEIR CASE IS
18 IMPORTANT, AND ONCE I START VALUING ONE PLAINTIFF'S CLAIMS
19 AGAINST ANOTHER, WE'VE LOST EVERYTHING.

20 **MR. JACOBSON:** YOUR HONOR, THAT I COMPLETELY GET, AND
21 I DON'T MEAN TO SUGGEST OTHERWISE.

22 **THE COURT:** I KNOW.

23 ALL RIGHT. SO THERE WILL BE NO STAY IN THE DISCOVERY
24 AT THIS POINT, AND I'M ONLY CONSIDERING A REQUEST BY
25 MR. DEMARAIS FOR A STAY PENDING THE MOTION. I'M NOT DECIDING

1 THE MOTION. THIS IS NOT WITH PREJUDICE. BUT IT'S JUST NOT
2 BEFORE ME. SO I'M NOT GOING TO DO THAT.

3 I AM GOING TO SET YOUR TRIAL. YOU CAN TELL YOUR
4 FAMILIES THAT THEY WON'T BE ENJOYING VACATION WITH YOU IN
5 AUGUST OF 2018.

6 I AM GOING -- I'M GOING TO SET THIS -- I'M ACTUALLY
7 GOING TO SET THIS -- WHAT I LIKE TO DO IS TO HAVE YOU COME IN
8 ON A FRIDAY FOR -- BECAUSE NO DOUBT YOU'LL WANT A JURY
9 QUESTIONNAIRE.

10 **MR. DESMARAIS:** YES.

11 **THE COURT:** AND SO WHAT I HAVE FOUND WORKS WELL IS TO
12 HAVE THE JURY PANEL COME IN ON THE FRIDAY BEFORE. WE DO THE
13 INITIAL HARDSHIP AND THE QUESTIONNAIRE, WHICH THEN GIVES YOU
14 THE WEEKEND TO REVIEW IT. AND THEN ON MONDAY MORNING, WE GO
15 RIGHT INTO THE VOIR DIRE, AND THAT JURY PANEL IS GENERALLY
16 IMPANELED BY 10:30 IN THE MORNING AND YOU GO RIGHT INTO OPENING
17 STATEMENTS. I FOUND THAT TO BE VERY EFFICIENT.

18 SO IF YOU WOULD PLAN ON AUGUST 3RD AS THE START OF
19 TRIAL, BUT THAT'S ONLY JURY SELECTION, THAT'S NOT WITNESSES AT
20 ALL.

21 **MR. JACOBSON:** YES.

22 **THE COURT:** YOU'LL ONLY BE HERE FOR A COUPLE OF
23 HOURS. IF WE HAVE SOME MORE CLEANUP WORK ON PRETRIAL THINGS,
24 WE CAN TAKE CARE OF THOSE.

25 I'M GOING TO SET YOUR PRETRIAL CONFERENCE ON JUNE 28

1 AT 1:30.

2 MR. JACOBSON: JUNE 28?

3 THE COURT: YES. WE'RE TALKING ABOUT 2018.

4 MR. JACOBSON: OKAY.

5 THE COURT: AND I'M GOING TO SET THE HEARING ON YOUR
6 MOTION FOR SUMMARY JUDGMENT ON APRIL 5TH, 2018.

7 MR. DESMARAIS: 5TH?

8 THE COURT: APRIL 5.

9 MR. DESMARAIS: YES.

10 MR. JACOBSON: YOUR HONOR, I NEED TO CHECK MY
11 SCHEDULE ON THAT.

12 THE COURT: OKAY.

13 MR. JACOBSON: I'M GOING TO BE THE CHAIR OF THE
14 SECTION OF ANTITRUST LAW AT THE ABA, AND THAT IS TYPICALLY WHEN
15 WE HAVE OUR SPRING MEETING, AND I EXPECT TO BE FULLY OCCUPIED.

16 THE COURT: IN APRIL, IS THAT --

17 MR. JACOBSON: WELL, IT'S -- USUALLY, IT'S THE LAST
18 WEEK OF MARCH OR THE FIRST WEEK OF APRIL. I HONESTLY DON'T
19 HAVE IT IN FRONT OF ME, BUT --

20 THE COURT: SO I WOULD RATHER GIVE YOU A DIFFERENT
21 DATE NOW BECAUSE THAT CALENDAR FILLS UP AS WELL. WOULD THE
22 12TH WORK? ONE WEEK LATER, IS THAT STILL --

23 MR. JACOBSON: I THINK SO, BUT CAN I GET BACK TO THE
24 COURT ON --

25 THE COURT: YES. BUT CAN WE -- WHICH IS MORE LIKELY,

1 THE 12TH?

2 MR. JACOBSON: THE 12TH IS MORE LIKELY TO BE OKAY.
3 IF WE COULD DO THE 19TH.

4 THE COURT: I CAN DO THE 19TH.

5 MR. JACOBSON: THAT I CAN GUARANTEE I WILL BE
6 AVAILABLE.

7 THE COURT: MR. DEMARAIS, IS THAT ALL RIGHT?

8 MR. DESMARAIS: THAT'S FINE, YOUR HONOR. WHAT TIME?

9 THE COURT: THAT'S AT 9:00 O'CLOCK. THAT'S ON THE
10 REGULAR MOTIONS CALENDAR. NOW --

11 MR. JACOBSON: THERE'S ONE OTHER ISSUE, YOUR HONOR,
12 WHICH IS THE NUMBER OF DEPOSITIONS THAT THE PARTIES --

13 THE COURT: RIGHT. LET ME JUST FINISH THE SCHEDULE,
14 AND THAT IS AN ISSUE I WANT TO DEAL WITH.

15 I DO NOT DO *DAUBERT* MOTIONS AT THE PRETRIAL.

16 MR. DESMARAIS: WE'RE MOST ASSUREDLY GOING TO HAVE
17 SOME, YOUR HONOR.

18 THE COURT: I KNOW YOU WILL. BUT I WANT TO BE CLEAR
19 THAT THE LAST HEARING THAT I WILL HAVE BEFORE TRIAL IS THE
20 JUNE 28 PRETRIAL CONFERENCE.

21 AND IF YOU HAVE *DAUBERT*, I TRY TO SCHEDULE THOSE ON A
22 FRIDAY, SOMETIMES THEY INVOLVE TESTIMONY, MORE OFTEN NOT. BUT
23 YOU DON'T KNOW YET. YOU HAVE BARELY BEGUN TO LOOK AT WHAT
24 EXPERTS YOU'D NEED.

25 SO I NEED YOU TO -- SO I'M NOT GOING TO SCHEDULE

1 DAUBERTS. I JUST CAN'T. I DON'T KNOW WHAT THE SCOPE WILL BE,
2 BUT I JUST WANTED TO BE CLEAR WITH YOU IT'S GOING TO HAVE TO BE
3 BEFORE JUNE 28TH.

4 **MR. DESMARAIS:** YES, YOUR HONOR.

5 **THE COURT:** AND YOU NEED TO CONTACT MY COURTROOM
6 DEPUTY AS EARLY AS POSSIBLE TO TRY TO GET A DATE FOR THAT.

7 NOW, ON THE SUMMARY JUDGMENT MOTION, THAT'S THE
8 HEARING DATE, I'M GOING TO HAVE YOU NOW MEET AND CONFER AND
9 WORK OUT THE REST OF THE CASE SCHEDULE FOR DISCOVERY CUTOFFS
10 WITH THESE DATES IN MIND. AND I URGE YOU TO WORK OUT A
11 REASONABLE BRIEFING SCHEDULE ON THE SUMMARY JUDGMENT. AND IF
12 YOU WANT TO GO AHEAD AND SET A DAUBERT DATE AND BRIEFING ON
13 THAT, YOU'RE WELCOME TO. I JUST FELT IT WOULD BE ARBITRARY IF
14 I TRIED TO DO IT RIGHT NOW.

15 NOW, THERE IS A QUESTION ON THE NUMBER OF
16 DEPOSITIONS. I FEEL LIKE I'VE BEEN DOWN THIS ROAD BEFORE.

17 **MR. JACOBSON:** I'M SURE YOU HAVE, YOUR HONOR. BUT IF
18 YOU LOOK AT THE 26(A) DISCLOSURES IN THIS CASE, BETWEEN THE TWO
19 PARTIES WE IDENTIFY OVER 40 WITNESSES.

20 **THE COURT:** YEAH.

21 **MR. JACOBSON:** AND SO TEN PER SIDE JUST SEEMS SILLY.

22 **THE COURT:** SO IT PROBABLY IS.

23 **MR. DESMARAIS:** (UNINTELLIGIBLE), YOUR HONOR, DON'T
24 FORGET WE HAVE BEEN LITIGATING FOR YEARS. MANY OF THESE PEOPLE
25 HAVE ALREADY BEEN DEPOSED. RIGHT? SO WE'VE TWO ITC CASES GO

1 FULL THROUGH DISCOVERY. WE'VE HAD THE CLI CASE WITH YOUR HONOR
2 GO FULL THROUGH DISCOVERY. AT SOME POINT WE DON'T HAVE TO
3 DEPOSE EVERYBODY IN THE COMPANY. THESE DEPOSITIONS SHOULD BE
4 JUST NEW PEOPLE ON NEW ISSUES, NOT REFLOWING OLD GROUND.

5 **THE COURT:** SO, MR. JACOBSON, I'M GOING TO ASK, AS I
6 DID IN THE OTHER CASE, THAT YOU LINE UP YOUR MOST IMPORTANT
7 DEPONENTS AS YOUR FIRST TEN, BECAUSE YOU CAN NEVER BE SURE I'LL
8 GIVE YOU MORE. YOU'RE ASKING FOR 30 AT THIS POINT. AND AS I
9 DID BEFORE, I'M GOING TO NEED TO SEE A LIST OF WHO THE
10 DEPONENTS WOULD BE AND WHY THEY'RE SO IMPORTANT AND WHY THEY
11 AREN'T PART OF THE TOP TEN.

12 IT'S NOT UNREASONABLE TO HAVE MORE THAN TEN AT ALL,
13 BUT I JUST AM NOT WILLING -- IF THERE IS NO AGREEMENT, I AM NOT
14 WILLING TO GIVE YOU A NUMBER AT THIS POINT.

15 **MR. JACOBSON:** HOW DO YOU WANT TO RECEIVE THAT, YOUR
16 HONOR?

17 **THE COURT:** I ACTUALLY WOULD RATHER -- AGAIN, WITH
18 THESE DISCOVERY ISSUES, I'M MORE INCLINED TO SEND THIS TO THE
19 MAGISTRATE JUDGE HANDLING THE CASE, BECAUSE, FRANKLY, I GOT
20 TIED UP IN A LOT OF THIS WITH TWO ROUNDS OF THIS ISSUE.

21 **MR. JACOBSON:** UNDERSTOOD.

22 **THE COURT:** AND IT WAS BURDENSOME, FRANKLY.

23 THIRTY IS A LOT. I DON'T KNOW THAT IT'S
24 INAPPROPRIATE IN THIS CASE.

25 **MR. JACOBSON:** I WOULD SAY THAT MARKET DEFINITION,

1 MARKET POWER THEMSELVES COULD BE TEN WITNESSES.

2 **THE COURT:** YEAH.

3 **MR. JACOBSON:** YOU KNOW, WE WOULD TRY TO AVOID THAT.

4 IN TERMS OF THE CLI, I SUSPECT THAT JUST A HAND FULL
5 OF WITNESSES ARE GOING TO HAVE TO BE CALLED FOR VERY BRIEF
6 DEPOSITIONS TO TALK ABOUT THE INDUSTRY NATURE OF THE STATEMENTS
7 AND THE INDUSTRY NATURE OF THE REALIZE.

8 BUT, CERTAINLY, IT'S NOT IN OUR INTERESTS AND I'M
9 GOING TO PLEDGE TO YOU RIGHT NOW THAT WE'RE NOT GOING TO ASK
10 THE SAME QUESTIONS OF THE SAME PEOPLE. WE'RE JUST NOT GOING TO
11 DO IT.

12 **MR. DESMARAIS:** I THINK WITH YOUR HONOR'S GUIDANCE WE
13 CAN PROBABLY WORK SOMETHING OUT.

14 **THE COURT:** I THINK YOU CAN PROBABLY WORK IT OUT MOST
15 OF THE WAY.

16 NOW, LET ME JUST ASK YOU. HAVE YOU GIVEN ANY THOUGHT
17 TO WHETHER IT IS APPROPRIATE FOR A MAGISTRATE JUDGE TO HANDLE
18 DISCOVERY IN THIS CASE OR WHETHER A SPECIAL MASTER IS MORE
19 APPROPRIATE?

20 **MR. DESMARAIS:** I THINK THE MAGISTRATE PROBABLY CAN
21 HANDLE IT. I THINK THE PARTIES IN THIS CASE ARE GOING TO GET
22 ALONG FINE, YOUR HONOR. SO I DON'T THINK IT'S GOING TO BE A
23 PROBLEM.

24 **THE COURT:** I APPRECIATE THAT, MR. DEMARAIS.
25 FRANKLY, MY EXPERIENCE IS WHEN I HAVE BEFORE ME THE TOP LAWYERS

1 IN THE COUNTRY, I DON'T EXPECT PROBLEMS, BECAUSE YOU DIDN'T GET
2 TO WHERE YOU ARE BY FIGHTING UNNECESSARY BATTLES, AND SO I
3 APPRECIATE THAT.

4 ALL RIGHT. AND I -- YOU KNOW, TO THE EXTENT THAT MY
5 INVOLVEMENT IN SOME OF THESE SKIRMISHES CAN BE HELPFUL, I
6 ENCOURAGE YOU TO CONTACT ME. I'M MORE THAN GLAD TO HAVE A
7 BRIEF TELEPHONE CONTACT IF IT CAN BE HELPFUL, AND THOSE I CAN
8 GENERALLY SCHEDULE PRETTY EASILY BECAUSE I CAN DO THOSE AFTER
9 HOURS.

10 IF YOU NEED TO GET ON TO CASE MANAGEMENT, WE TRY TO
11 SCHEDULE THAT PRETTY EASILY AS WELL, BUT IT'S A LOT OF TRAVEL
12 FOR ALL OF YOU. AND IF I CAN TAKE CARE OF IT BY PHONE AND A
13 TWO-PAGE EXPLANATION OF THE PROBLEM, THAT'S EFFICIENT FOR
14 EVERYBODY AND I LIKE TO DO THAT.

15 **MR. JACOBSON:** WE COULD ALSO INVITE YOU TO NEW YORK.

16 **MR. DESMARAIS:** I SAID THE SAME.

17 (SIMULTANEOUS SPEAKING.)

18 **THE COURT:** WELL, YOU KNOW, THAT'S ALWAYS A NICE
19 THING. OH, ALL OF YOU. OKAY. IT WOULD HAVE ITS ADVANTAGES,
20 WOULDN'T IT?

21 ALL RIGHT.

22 **MR. DESMARAIS:** THERE'S ONE OTHER --

23 **THE COURT:** OKAY.

24 **MR. DESMARAIS:** SO ON THE AMICUS?

25 **THE COURT:** OH, YEAH.

1 **MR. DESMARAIS:** I WANTED TO INQUIRE WHAT THE COURT'S
2 PREFERENCE IS. IF YOU ARE GOING TO ALLOW IT, WE'VE AGREED
3 AMONGST US, AND I WOULD PROPOSE TO YOU HOW TO HANDLE IT, BUT IF
4 YOU'RE NOT GOING TO ALLOW IT, THEN WE DON'T NEED TO --

5 **THE COURT:** WELL, MY FIRST REACTION WHEN I -- AND I
6 HAVEN'T LOOKED AT THE AMICUS ITSELF, BUT WHEN IT CAME IN, IT'S
7 NOT ATTACHED TO ANYTHING AND SO IT'S NOT APROPOS OF ANY ISSUE
8 BEFORE ME.

9 **MR. DESMARAIS:** I AGREE WITH YOU. I THINK THAT
10 AMICUS IS A GENERAL PROPHECY ON THE LAW. IT'S NOT TAILORED TO
11 THE ISSUE YOU ARE GOING TO BE DECIDING, SO I DON'T KNOW IF IT'S
12 RELEVANT TO ANYTHING.

13 **MR. JACOBSON:** YOUR HONOR --

14 **THE COURT:** I WISH I HAD TIME FOR THAT MUCH READING,
15 BUT, FRANKLY --

16 **MR. JACOBSON:** CAN I --

17 **THE COURT:** THAT'S TOUGH.

18 **MR. JACOBSON:** CAN I EXPLAIN WHY I THINK IT'S
19 IMPORTANT AND HELPFUL?

20 THE BRIEF DOES NOT TAKE ANY POSITION ON ANY OF THE
21 ISSUES IN THE CASE. IT DOESN'T TAKE AN ISSUE POSITION ON
22 *TWOMBLY*. IT DOESN'T IF TAKE AN ISSUE ON THE BUNDLING OR
23 INTIMIDATION ASPECTS.

24 WHAT IT DOES SAY IS THAT IF THE FACTS ALLEGED IN THE
25 COMPLAINT ON THE CLI ASPECT OF THE CASE ARE TRUE, THAT THAT IS

1 COPYRIGHT HOLDUP AND CAUSES THE SAME INDUSTRY-WIDE HARM THAT
2 YOU SEE IN THE STANDARD ESSENTIAL PATENTS CASES AND CASES LIKE
3 THAT.

4 IT'S PURELY SUBMITTED IN THE PUBLIC INTEREST. IT
5 FAVORS US, WHICH I ALSO BELIEVE IS IN THE PUBLIC INTEREST.
6 BUT, YOUR HONOR, I THINK YOU WILL FIND IT INFORMATIVE, AND I
7 WOULD ENCOURAGE YOU AT LEAST TO TAKE A LOOK AT THE MOTION FOR
8 LEAVE WITH AN OPEN MIND.

9 **THE COURT:** AND, MR. DEMARAIS, ARE YOU GOING TO
10 OPPOSE IT?

11 **MR. DESMARAIS:** WELL, SO --

12 **THE COURT:** -- OR SCOUR UP SOMETHING THAT GIVES THE
13 OTHER VIEW?

14 **MR. DESMARAIS:** YES. LET ME EXPLAIN WHY I THINK IT'S
15 WASTE OF THE COURT'S RESOURCES TO EVEN REVIEW IT. I DON'T
16 DISAGREE WITH MR. JACOBSON AS TO WHAT IT COVERS. THAT'S NOT
17 BEEN BRIEFED, RIGHT? OUR MOTION TO STAY AND/OR DISMISS IS NOT
18 ABOUT WHETHER IF EVERYTHING IN THE COMPLAINT IS TRUE, WHETHER
19 THERE'S A CLAIM.

20 OUR MOTION TO DISMISS IS ABOUT THEY HAVEN'T BEEN
21 SUFFICIENTLY PLED AND HAVEN'T SUFFICIENTLY -- YOU KNOW, HAVE A
22 BASIS FOR THAT CLAIM.

23 SO THE AMICUS BRIEF IS REALLY ABOUT A DISPUTE WE'RE
24 NOT HAVING. ALL YOU NEED TO DECIDE TO DECIDE THE MOTION TO
25 DISMISS IS DID THEY PROPERLY PLEAD THAT CLAIM, IS THERE A

1 FACTUAL BASIS FOR THE THINGS THEY'RE SAYING. WE'RE NOT TAKING
2 ISSUE WITH THE FUNDAMENTAL IDEA THAT IF ALL OF THOSE -- IF WE
3 DID ALL THOSE THINGS THEY SAID, THERE'S A TRIABLE CLAIM HERE.
4 WE'RE NOT TAKING THAT ISSUE.

5 YOU KNOW, IF YOU WANT US TO RESPOND TO THE BRIEF,
6 WHAT WE WOULD SAY IS IT'S NOT RELEVANT TO ANY ISSUE BEFORE THE
7 COURT, AND IT'S NOT HELPFUL. SO...

8 **MR. JACOBSON:** YOUR HONOR, COULD I ADDRESS THAT,
9 BECAUSE THAT IS FUNDAMENTALLY WRONG.

10 SO THE BASIS OF THE MOTION TO DISMISS, AT LEAST ON
11 THE CLI ASPECT OF THE CASE, IS THAT WE HAVE AN ALLEGED FRAUD.
12 AND WHAT OUR OPPOSITION BRIEF EXPLAINS AND WHAT THE AMICUS
13 EXPLAINS IS THAT FRAUD IS NEVER AN ELEMENT IN A CLAIM SUCH AS
14 THIS. THIS IS A CHANGE OF POLICY CASE. IT IS NOT A FRAUD
15 CASE. AND WHETHER THERE WAS INTENT AT THE TIME THAT CLI WAS
16 MADE INDUSTRY STANDARD BY CISCO IS NOT RELEVANT.

17 IF CISCO HAD NO INTENTION OF CHANGING POLICY WHEN IT
18 FIRST DID THIS, THAT DOESN'T NEGATE THE ANTITRUST CLAIM FROM
19 THE FACT THAT IT LATER DID. AND THAT IS WHAT I BELIEVE THE
20 AMICUS BRIEF WILL BE HELPFUL TO YOU IN EVALUATING.

21 **THE COURT:** SO IF THE AMICUS BRIEF IS SUBMITTED IN
22 SUPPORT OF THE MOTION TO DISMISS, THAT PUTS IT IN A DIFFERENT
23 LIGHT.

24 **MR. JACOBSON:** WELL, IT'S IN OPPOSITION.

25 **THE COURT:** IN OPPOSITION, RATHER. SORRY.

1 BUT I THOUGHT IT WAS JUST FILED AS: HERE'S AN AMICUS
2 BRIEF.

3 **MR. JACOBSON:** IT IS MORE THAN THAT, YOUR HONOR. IT
4 CAREFULLY DECIDES NOT TO TAKE A POSITION --

5 **THE COURT:** YEAH.

6 **MR. JACOBSON:** -- ON WHETHER WE HAVE ENOUGH FACTUAL
7 MATTER IN OUR COMPLAINT. WE DO, BUT THAT'S FOR US TO BRIEF.

8 WHAT IT DOES SAY IS THAT THE LEGAL APPROACH TAKEN TO
9 THE CLI ASPECT OF THE CASE AND CISCO'S MOTION IS UNSOUND, AND I
10 THINK YOUR HONOR WILL FIND THAT VERY HELPFUL.

11 **THE COURT:** WELL, MR. DEMARAIS, DID YOU WANT TO --
12 WERE YOU GOING TO OPPOSE THE ADMINISTRATIVE MOTION IN WRITING?

13 **MR. DESMARAIS:** WHAT I WAS GOING TO SUGGEST, YOUR
14 HONOR, IS -- AND I HAVE SPOKEN TO MR. JACOBSON, AND WE'RE IN
15 AGREEMENT ON IT, IS THIS -- WHICH SHOWS YOU WE CAN AGREE ON
16 SOME THINGS.

17 IF YOUR HONOR IS GOING TO REVIEW THE AMICUS BRIEF,
18 MR. JACOBSON HAS CONSENTED TO GIVE US FIVE EXTRA PAGES IN OUR
19 REPLY.

20 **THE COURT:** OH, WELL. THEN YOU'VE ANSWERED MY
21 QUESTION. I'M NOT GOING TO ACCEPT IT. I AM NOT. I'M SORRY,
22 BUT THERE IS -- YOU WILL BE DIVERTING MY ATTENTION FROM THE
23 MOTION, AND I NEED TO DECIDE THE MOTION, AND I WILL NOT TAKE
24 EXTRA ON IT. IT'S JUST NOT GOING TO HAPPEN. SO I THINK THAT
25 TAKES CARE OF THAT.

1 AND I THINK TO THE EXTENT THOSE ISSUES ARE OF VALUE,
2 THEY CAN BE ARGUED ON THE DAY OF THE HEARING, BUT I AM JUST NOT
3 GOING TO OPEN THE DOOR TO FURTHER BRIEFING ON THE ISSUE. YOU
4 FILED YOUR MOTION TO DISMISS.

5 **MR. DESMARAIS:** YES.

6 **THE COURT:** AND IT'S BRIEFED, AND THAT'S WHERE WE'RE
7 GOING TO LET IT GO. ALL RIGHT.

8 **MR. DESMARAIS:** THANK YOU, YOUR HONOR.

9 **MR. JACOBSON:** THANK YOU, YOUR HONOR.

10 **THE COURT:** WELL, I REALLY APPRECIATE BOTH OF YOU
11 BEING HERE. IT'S REALLY A PLEASURE TO MEET BOTH OF YOU. I
12 KNOW -- I KNOW THIS CASE IS -- EACH OF THESE CASES IS REALLY
13 QUITE EXTENSIVE. AND IT WAS CLEAR TO ME WHEN I DID NOT ALLOW
14 THE ANTITRUST CLAIM TO BE AN AMENDED COUNTERCLAIM TO THE CLI
15 CASE THAT THIS -- THAT THAT WAS IMPORTANT. AND I CAN SEE NOW
16 THAT THIS IS REALLY SO MUCH BIGGER THAN EVEN I IMAGINED WHEN I
17 FIRST SAW IT.

18 SO ALL RIGHT. I THINK YOU HAVE SOME BASIC DATES THAT
19 YOU CAN DEAL WITH. I TYPICALLY DON'T GO AHEAD AND SET FURTHER
20 CASE MANAGEMENT. THE TIMING TENDS TO BE ARBITRARY. I THINK
21 THIS IS A CASE THAT WOULD BENEFIT FROM CASE MANAGEMENT, BUT I'M
22 GOING TO ASK THAT YOU PROMPT WHEN IT IS BENEFICIAL.

23 I WILL ASK THAT WITHIN THE NEXT 14 DAYS YOU WORK OUT
24 THAT SCHEDULE AND SEND ME A STIPULATION AND ORDER ON THAT. AND
25 AS ISSUES COME UP -- AND CERTAINLY, MR. JACOBSON, IF OUR DATE

1 FOR THAT SUMMARY JUDGMENT MOTION STILL INTERFERES, YOU'LL LET
2 ME KNOW RIGHT AWAY, AND WE'LL WORK SOMETHING OUT.

3 **MR. JACOBSON:** I WILL ACTUALLY LET YOU KNOW RIGHT
4 AWAY.

5 **THE COURT:** AND THOSE APRIL DATES, IF YOU JUST GIVE
6 MR. DEMARAIS A CALL AND GET BACK TO ME WITH SOME SUGGESTED
7 DATES, THAT WILL BE GREAT.

8 **MR. JACOBSON:** WE ARE TRYING TO GET JUSTICE BREYER TO
9 APPEAR AT THAT MEETING, YOUR HONOR, SO I HOPE THAT HAPPENS.

10 **THE COURT:** THAT WOULD BE NICE. THAT'S WORTH YOUR
11 EFFORT. THANK YOU BOTH.

12 **MR. DESMARAIS:** THANK YOU, YOUR HONOR.

13 **THE COURT:** ALL RIGHT.

14 (PROCEEDINGS ADJOURNED AT 11:53 A.M.)
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CERTIFICATE OF TRANSCRIBER

I CERTIFY THAT THE FOREGOING IS A TRUE AND CORRECT
TRANSCRIPT, TO THE BEST OF MY ABILITY, OF THE ABOVE PAGES OF
THE OFFICIAL ELECTRONIC SOUND RECORDING PROVIDED TO ME BY THE
U.S. DISTRICT COURT, NORTHERN DISTRICT OF CALIFORNIA, OF THE
PROCEEDINGS TAKEN ON THE DATE AND TIME PREVIOUSLY STATED IN THE
ABOVE MATTER.

I FURTHER CERTIFY THAT I AM NEITHER COUNSEL FOR,
RELATED TO, NOR EMPLOYED BY ANY OF THE PARTIES TO THE ACTION IN
WHICH THIS HEARING WAS TAKEN; AND, FURTHER, THAT I AM NOT
FINANCIALLY NOR OTHERWISE INTERESTED IN THE OUTCOME OF THE
ACTION.



JOAN MARIE COLUMBINI

MAY 29, 2016